QUESTIONS PRESENTED

1. Is the wife (a "potential" widow) of an injured worker a "person entitled to compensation" under § 33(g) of the Longshore and Harbor Workers' Compensation Act ("LHWCA") when she enters into third party tort settlements during the lifetime of her husband?

2. Does the Director of the Office of Workers' Compensation Programs have standing to respond to a Petition For Review of a Benefits Review Board decision pursuant to Fed.R.App.P. 15(a)?

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STATUTES INVOLVED

This case involves the interpretation of 33 U.S.C. § 933(g), the Longshore and Harbor Workers' Compensation Act. As reflected in the opinion of the Fifth Circuit Court of Appeals, 33 U.S.C. § 933(f) was not invoked with respect to the pre-death settlements that are involved in this Appeal.

STATEMENT OF THE CASE

For ease of reference, the Petitioners will be referred to as "Ingalls" or the "Petitioners". The Claimant-Respondent will be referred to as "Maggie Yates", "Mrs. Yates", or the "Respondent". The Respondent, Director of the Office of Workers' Compensation Programs, will be referred to as the "Director". The Administrative Law Judge and the Benefits Review Board will be referred to as the "ALJ" and the "BRB" or the "Board", respectively. Pursuant to Sup.Ct.R. 24.1(g), references to the Petitioners' Appendix submitted with the Petition For Writ of Certiorari will be by the designation (Pet. App.), and references to the Respondent's Appendix in the opposing brief will be by the designation (Resp. App.). References to other portions of the record will be by the designation (R.), and references to testimony before the ALJ will be by the designation (Tr.). Joint exhibits and the Employer's exhibits will be referred to as (JX) and (Emp. Exh.), respectively.

Jefferson and Maggie Yates married in 1931 when Mrs. Yates was twenty-three years old. (Tr. 22-23). For approximately thirty years, they lived in George County,

Mississippi. (Tr. 22). Mr. Yates worked for Ingalls as a shipfitter beginning in 1953. He ended his employment with Ingalls in September, 1967. Mr. Yates worked in other jobs until he voluntarily retired in 1974 at the age of sixty-seven. (R. 246).

On March 23, 1981, Mr. Yates was evaluated for asbestos-related diseases. On April 16, 1981, Mr. Yates filed a claim for disability benefits against Ingalls under the Longshore and Harbor Workers' Compensation Act (the "LHWCA" or the "Act"). (R. 246; Pet. App. 61). On May 26, 1981, he filed a third-party tort action in the United States District Court for the Southern District of Mississippi, Southern Division, seeking damages against the manufacturers and sellers of asbestos products to which he was exposed while employed at Ingalls. (R. 247; Tr. 30; Pet. App. 61). Mrs. Yates was not a plaintiff in the third-party action. (Pet. App. 61).

Mr. Yates was diagnosed with asbestosis on April 17, 1981. He died on January 28, 1986. His death was caused in part by his asbestos exposure. (Pet. App. 59). On April 22, 1986, Maggie Yates, Mr. Yates' widow, filed a claim for death benefits under § 9 of the LHWCA. 33 U.S.C. § 909; (Pet. App. 63). At the time of Mr. Yates' death, none of Mr. Yates' six (6) children were minors or dependent on Mr. Yates. None of the children filed claims for death benefits under the LHWCA. (R. 246; Tr. 37; Pet. App. 60, 63).

Before his death, Mr. Yates agreed to settlements with eight third-party defendants (the "pre-death settlements"). Mrs. Yates joined in the settlements, which were made without obtaining Ingalls' prior written approval.

(R. 247; Pet. App. 62-63). Releases were signed which released the third-party defendants from liability arising from Mr. Yates' exposure to asbestos. Some of the earlier third-party settlements limited the Mrs. Yates' release to loss of consortium. (R. 248; Pet. App. 63). Other settlements used language to foreclose Mrs. Yates from bringing any future tort claim for the wrongful death of Mr. Yates. (R. 248; Pet. App. 63). None of the pre-death settlements foreclosed Ingalls from bringing its own claim under *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 89 S.Ct. 1144, 22 L.Ed.2d 371 (1969). (R. 248; Pet. App. 63).

Mr. Yates' LHWCA claim for disability benefits under § 8 of the Act was filed before his death, and settled pursuant to § 8(i) of the Act on May 5, 1983 for a lump sum payment of $15,000.00, open medical benefits, and an award of attorney's fees. (R. 245, 247; Pet. App. 62). The medical benefits referenced in this settlement amounted to $454.15. Therefore, Ingalls' total liability for compensation and medical benefits to Mr. Yates was $15,454.15. Hence, Ingalls' lien in the third-party suit was $15,454.15. Ingalls had notice of the pre-death settlements, and asserted its lien. Ingalls recouped its compensation lien of $15,454.15 in full. (R. 253; Pet. App. 62-63).

On January 28, 1986, Mr. Yates died from prostate cancer. The parties stipulated that Mr. Yates' asbestosis contributed to his death. (JX-1; Pet. App. 58-59). On April 22, 1986, Mrs. Yates filed a claim for death benefits under § 9 of the LHWCA. (Pet. App. 63). Ingalls controverted Mrs. Yates' claim for death benefits, arguing that the claim was barred by the forfeiture provisions of 33 U.S.C. § 933(g)(1) and (2) because Mrs. Yates failed to obtain the

written approval of Ingalls for the third-party settlements entered into before Mr. Yates' death. (Pet. App. 59-60).

A formal hearing was held before an administrative law judge on June 7, 1991, at which Maggie Yates, then eighty-three (83) years old, testified. (Tr. 22-23). The ALJ found that Mrs. Yates' death claim was not barred by § 33(g), because she was not a "person entitled to compensation" at the time of the pre-death settlements. (Pet. App. 65-72). Ingalls prosecuted an appeal to the BRB. The BRB affirmed the ALJ's ruling on § 33(g), since Mrs. Yates was not a "person entitled to compensation" at the time of the pre-death settlements. (Pet. App. 24-37). Ingalls then appealed to the United States Court of Appeals for the Fifth Circuit. On October 3, 1995, the Fifth Circuit affirmed the BRB, and held that Mrs. Yates was not a "person entitled to compensation" within the meaning of § 33(g) at the time of the pre-death settlements. (Pet. App. 6-11); *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 65 F.3d 460, 463-64 (5th Cir. 1995). Ingalls' suggestion for rehearing *en banc* was denied by the Fifth Circuit on November 22, 1995. (Pet. App. 18-19).

This Court granted certiorari to review the Fifth Circuit's decision with respect to § 33(g) of the LHWCA and the standing of the Director to respond to a petition for review of the BRB decision.

SUMMARY OF THE ARGUMENT

Maggie Yates' LHWCA claim was for death benefits under § 9 of the Act. A dependent's claim for death benefits is separate and distinct from a claim for disability benefits by an injured worker on whom the death claimant is dependent. A dependent's claim for death benefits does not accrue until the death of the worker to whom the death claimant is married or a dependent. Hence, a claim for death benefits cannot vest until the death of the injured worker-spouse on whom the claimant is dependent. Under *Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 112 S.Ct. 2589, 120 L.Ed.2d 379 (1992), an LHWCA claimant becomes a "person entitled to compensation" at the moment his right to recovery vests. And, for purposes of forfeiture under § 33(g)(1), the outcome-determinative issue is whether the claimant is a "person entitled to compensation", and more precisely, whether the claimant was such a person at the time of the third-party settlement. The status of "person entitled to compensation" is conferred by § 33(g) and *Cowart* only if the claimant has satisfied the prerequisites attached to the right to compensation. In other words, the forfeiture provisions of § 33(g)(1) and (2) apply only if the claimant makes an unapproved third-party settlement when the claimant has qualified for, and has an entitlement to, the right or benefit under the LHWCA.

When Mrs. Yates entered into the third-party tort settlements before Mr. Yates' death, she was not a "person entitled to compensation". At the time of the pre-death settlements, it was Mr. Yates – not Mrs. Yates – who was the "person entitled to compensation" within the meaning of § 33(g)(1). Mrs. Yates' claim for death benefits accrued, and therefore vested, on January 28, 1986, when Mr. Yates died.

The plain language of § 33 of the LHWCA, as interpreted by this Court in *Cowart*, controls the issue. As in *Cowart*, the Court may not judicially rewrite the statute on the Petitioners' plea that, as an abstract matter, their argument is "good policy". *Cowart* teaches that "the beginning point must be the language of the statute", and "when a statute speaks with clarity to an issue. . . . courts must give effect to the clear meaning of statutes as written". *Cowart*, 112 S.Ct. at 2594.

The Fifth Circuit correctly held that the Director is a proper respondent under Fed.R.App. 15(a), which expressly requires a party seeking review of an agency order to name the agency as a respondent. The Secretary of Labor has the authority to appoint counsel to represent him "in any court proceedings under § 921". 33 U.S.C. § 921(a). Pursuant to that authority, the Secretary of Labor has named the Director of OWCP as his designee responsible for enforcing the LHWCA, and as the proper party to appear on behalf of the Secretary in all review proceedings. Because the Director's views are entitled to deference, it would be an anomaly to preclude the Director from expressing those views in court as a respondent on issues of national import.

ARGUMENT

1. IS THE WIFE (A "POTENTIAL" WIDOW) OF AN INJURED WORKER A "PERSON ENTITLED TO COMPENSATION" UNDER § 33(g) OF THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT ("LHWCA") WHEN SHE ENTERS INTO THIRD-PARTY SETTLEMENTS DURING THE LIFETIME OF HER HUSBAND?

The Petitioners argue that by settling her potential third-party claims for the wrongful death of her husband during her husband's lifetime, Mrs. Yates' LHWCA claim for death benefits, which accrued only at the time of her husband's death, is barred by the forfeiture provisions of § 33(g). Put another way, the Petitioners argue that Mrs. Yates was a "person entitled to compensation" at the time of the pre-death settlements. The Petitioners' argument is contrary to logic, and most importantly, contrary to the express language of the statute as interpreted by this Court in *Cowart*.

a. The Outcome-Determinative Issue Under § 33(g) And *Cowart* Is Whether Maggie Yates Was A "Person Entitled To Compensation" At The Time Of The Pre-Death Settlements, And Logic And Law Dictate That She Was Not A "Person Entitled To Compensation" At That Time.

Consideration of the issue of forfeiture under § 33(g) begins with the language of the statute itself, and the Court's interpretation of the statute in *Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 112 S.Ct. 2589, 120 L.Ed.2d 379 (1992). As *Cowart* teaches, "the beginning point must be the language of the statute. . . . When a statute speaks

with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished. . . . The controlling principle. . . . is the basic. . . . rule that courts must give effect to the clear meaning of statutes as written". *Id.*, at 2594.

Section 33(g)(1) provides:

> *"Compromise Obtained By Person Entitled To Compensation"*. (1) If the *person entitled to compensation* (or the person's representative) enters into a settlement with a third person referred to in subsection (a) *for an amount less than the compensation to which the person* (or the person's representative) would be entitled under this Act, the employer shall be liable for compensation as determined under subsection (f) only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the *person entitled to compensation* (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into." (emphasis added).

Section 33(g)(2) provides that all rights to compensation and medical benefits under the Act shall be terminated if no written approval of the settlement is obtained as required by § 33(g)(1). The written approval must be obtained by the "person entitled to compensation" who *enters* into a settlement with a third-party for an amount less than the compensation to which that person is entitled. (emphasis added).

In *Cowart*, the claimant suffered a scheduled injury to the hand on July 29, 1983. The LHWCA employer and carrier paid the Claimant temporary disability payments for ten (10) months following the injury. However, the employer and carrier failed to make additional compensation payments for permanent partial disability, although the Department of Labor notified the carrier that Cowart was owed permanent partial disability compensation. Cowart filed a third-party tort action against Transco Exploration Company ("Transco"), which he settled on July 1, 1995. Ironically, the third-party settlement was funded entirely by the employer under an indemnification agreement with Transco, the third-party sued by Cowart. However, Cowart did not obtain written prior approval from the employer under § 33(g)(1). Cowart then filed a claim for LHWCA benefits. The employer defended the LHWCA claim on the ground that Cowart had forfeited his compensation benefits under § 33(g)(2) by failing to obtain prior written approval required by § 33(g)(1). This Court held that the outcome-determinative issue was whether Cowart was a "person entitled to compensation" under § 33(g)(1), and more precisely, whether Cowart was such a person at the time of the third-party settlement. This Court specifically held:

> "The question is whether Cowart, *at the time of the Transco settlement,* was a 'person entitled to compensation' under the terms of § 33(g)(1) of the LHWCA". *Id.*, at 2594. (emphasis added).

This Court observed that "both in legal and general usage, the normal meaning of entitlement includes a right or benefit for which a person qualifies", and it meant only that "the person satisfies the prerequisites attached

to the right". *Id.*, at 2595. Hence, the claimant "became a person entitled to compensation *at the moment his right to recovery vested*, not when his employer admitted liability. . . . ". *Id.* (emphasis added). Cowart's LHWCA claim vested at the time of his traumatic work-related injury. Cowart became a "person entitled to compensation" at the time of his injury, and he was paid temporary disability payments after the injury. Section 33(g)(1) applies only where the "person entitled to compensation enters into a settlement" with a third-party. The forfeiture provision of 33(g)(1) and (2) is not triggered or implicated unless the claimant so qualifies at the time of the settlement.

The critical time, therefore, for measuring "person entitled to compensation" status is the time at which the LHWCA claimant *enters* into a settlement with a third person. (emphasis added). "Congress' use of a verb tense is significant in construing statutes". *United States v. Wilson*, 503 U.S 329, 112 S.Ct. 1351, 1354 , 117 L.Ed.2d 593 (1992). *Cowart's* interpretation of § 33(g) and the use of the present tense of "enters" in the statute undercuts the Petitioners' argument that a spouse such as Mrs. Yates is barred by § 33(g)(1) from receiving death benefits under the Act "whether the unapproved settlements occurred before or after the husband's death". (Pet. Brief 7). Section 33(g)(1) does not apply to the situation in which a person with an unmatured "potential" claim, and therefore with no claim, enters into a third-party settlement.

By any measure of law and logic, Mrs. Yates was not a "person entitled to compensation" at the time of the pre-death settlements. It was Mr. Yates, and not Mrs. Yates, who was the "person entitled to compensation" at

the time of the pre-death settlements, because only he had a matured and vested claim for compensation under the LHWCA at the time of the pre-death settlements. Before the death of her husband, Mrs. Yates was not entitled to the specific right or benefit involved here – death benefits under § 9 of the LHWCA. Put another way, at the time of the pre-death settlements, Mrs. Yates did not "satisfy the prerequisites attached to the right" to death benefits under the LHWCA.

Did Mrs. Yates qualify for a death benefit under the LHWCA at the time of the pre-death settlements? The ALJ, the BRB, and the Fifth Circuit correctly answered, no, because Mrs. Yates' "right to death benefits under the Act could not have vested *before* she became a widow". (Pet. App. 35) (BRB's emphasis). As observed by the Fifth Circuit, there were three contingencies under which Mrs. Yates' "potential" claim for death benefits under the LHWCA would have never accrued. "She could have predeceased or divorced her husband, or Jefferson Yates could have died from causes unrelated to his employment". *Ingalls Shipbuilding, Inc. v. Director, OWCP, supra,* at 464; (Pet. App. 10-11, 35). Upon the happening of any of the three contingencies, Mrs. Yates' claim for death benefits never would have accrued. Yet, the Petitioners' attempt to visit the harsh consequences of § 33(g) forfeiture on Mrs. Yates and other dependents of deceased LHWCA workers by arguing that Mrs. Yates had a "potential" death claim which "vested" at the time of her husband's injury. (Pet. Brief 21). Arguing language from the Ninth Circuit in *Force v. Director OWPC*, 938 F.2d 981 (9th Cir. 1991), the Petitioners urge that "a claimant's

status as a 'person entitled to compensation' need not be fixed at any particular moment". (Pet. Brief 17).

It is here that we must point out the nature of Maggie Yates' claim. Her claim was one for death benefits under § 9 of the Act, as opposed to one for disability benefits made by Mr. Yates during his lifetime. 33 U.S.C. § 908 (disability claims); 33 U.S.C. § 909 (death claims). The Petitioners' argument that a "potential widow's claim" vests before her husband's death belies any real understanding of the difference between a claim for disability benefits and a claim for death benefits, and is contrary to well settled case law which notes the distinctions between the two types of claims under the Act.

b. The Petitioners' Argument That A "Potential Widow's" Claim For Death Benefits Vests Before Her Husband's Death Belies Any Real Understanding Of The Difference Between A Claim For Disability Benefits And A Claim For Death Benefits, And Is Contrary To Longstanding Case Law Drawing The Distinctions Between The Two Types Of Claims Under The LHWCA.

The Petitioners have argued to the Court that "a potential widow's claim vests at the time of her husband's injury as opposed to the time of his death". (Pet. Cert. 14). This argument is continued in one form or another in the Petitioners' Brief On The Merits, and is represented by the following statements:

> "Since Mrs. Yates' status as a dependent widow was established as of the time of her husband's injury, her § 33(g) approval obligations were

> also established at the time of his injury". (Pet. Brief 21).
>
> "Mrs. Yates was just as entitled to receive compensation under the LHWCA as she was entitled to recover for her husband's wrongful death when she entered into the unapproved settlements during his lifetime". (Pet. Brief 22).
>
> ". . . . because she (Mrs. Yates) became vested with the LHWCA's protections and benefits once her husband was injured at work, she was a 'person entitled to compensation' . . . " (Pet. Brief 23).
>
> ". . . . where an employee is injured at work in such a way that the injury *may lead* to the employee's death, the fact that the spouse of the employee is not yet receiving compensation while the employee is alive does not mean that she loses her status as a 'person entitled to compensation' ". (Pet. Brief 26-27). (emphasis added).

Mrs. Yates did not advance the same claim for benefits under the LHWCA as her husband. During his lifetime, Mr. Yates asserted a claim for disability benefits under § 8 of the Act to which Mrs. Yates was not a party. After Mr. Yates' death, Mrs. Yates filed a separate and distinct claim – a claim for death benefits as a dependent widow. Under the Petitioners' "mix and match" approach, the Petitioners blur the distinction between an accrued, and therefore vested, claim for disability benefits by an injured worker during his lifetime, and a claim for death benefits by a dependent of that worker which arises, if at all, only when the worker dies and the death is causally related to the employment.

Mrs. Yates could not have invoked the administrative machinery of the LHWCA to pursue a death claim while Mr. Yates was living. While Mr. Yates was living, Mrs. Yates had no claim or entitlement to benefits under the LHWCA. One could imagine what Ingalls would have said had Mrs. Yates asserted or filed a claim for death benefits under § 9 of the Act while Mr. Yates was living. Had Mrs. Yates made a claim for death benefits while Mr. Yates was living, there would have been a clear invitation for Ingalls to argue, quite properly, that the death claim had been "instituted or continued without reasonable grounds", and that costs should be assessed against Mrs. Yates. 33 U.S.C. § 926.

A claim for death benefits arises only upon the death of a worker covered by the LHWCA to whom the claimant was married or dependent. *I.N.A. v. Dept. of Labor*, 969 F.2d 1400, 1405-06 (2nd Cir. 1992) (right to death benefits a separate claim which did not accrue until death); *Shea v. Director, OWCP*, 929 F.2d 736, 739 (D.C. Cir. 1991); *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 779, 784-86 (5th Cir. 1988) (right to death benefits may not be settled before it arises, *i.e.*, before the death of the injured worker); *Henry v. George Hyman Const. Co.*, 749 F.2d 65, 73-74 (D.C. Cir. 1984) ("when death occurs, a new cause of action arises"); *Travelers Ins. Co. v. Marshall*, 634 F.2d 843, 846 (5th Cir. 1981) ("cause of action for death benefits certainly does not arise until death"); *Puig v. Standard Dredging Corp.*, 599 F.2d 467, 469 (1st Cir. 1979); *Todd Shipyards Corp. v. Witthuhn*, 596 F.2d 899, 902 (9th Cir. 1979) (injured workers' deaths give rise to new claims for relief not in existence during their lifetimes; when they died. . . . their survivors' rights to death benefits first vested. . . . "); *St.*

Louis Ship Building and Steel Co. v. Casteel, 583 F.2d 876, 877 (8th Cir. 1978) ("liability for death benefits comes into existence only upon the event of death and is therefore independent of the liability for disability benefits occasioned by the earlier injury"); *Nacirema Operating Co. v. Lynn*, 577 F.2d 852, 853 (3rd Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979) ("right to death benefits does not vest until the time of death"); *State Insurance Fund v. Pesce*, 548 F.2d 1112, 1114 (2nd Cir. 1977) ("right to death benefits separate and distinct from right to disability benefits, and does not come into being until death"); *Norfolk, Baltimore and Carolina Lines, Inc. v. Director, OWCP*, 539 F.2d 378, 380 (4th Cir. 1976), *cert. denied*, 429 U.S. 1078 (1977) (death claim does not exist during decedent's lifetime, and does not become vested until death); *Hampton Roads Stevedoring Corp. v. O'Hearne*, 184 F.2d 76, 79 (4th Cir. 1950); *International Mercantile Marine Co. v. Lowe*, 93 F.2d 663, 664 (2nd Cir. 1938), *cert. denied*, 304 U.S. 565 (1938).

In short, claims for disability benefits under § 8 and for death benefits under § 9 are separate and distinct, having different claimants, and accruing on different bases. *Id.*; *Alabama Dry Dock and Shipbuilding Co. v. Director, OWCP*, 804 F.2d 1558, 1560-61 (11th Cir. 1986). The conceptual difference between the two types of claims under the Act eliminates any notion of "double recovery" if a claimant such as Maggie Yates receives a death benefit after her deceased husband received a disability benefit during his lifetime. *Henry v. George Hyman Const., supra*, at 74. LHWCA regulations also underscore the distinction between the disability claim of an injured worker and the death claim of his survivors. An injured employee can settle his right to compensation or medical

benefits, but not his survivors' right to death benefits. 20 C.F.R. § 702.241(g) (agreement to settle claim is limited to rights of the parties and to claims then in existence; settlement of disability compensation or medical benefits shall not be settlement of survivor benefits nor affect survivors' right to file claim for survivors' benefits). The spouse of an injured worker is not a party to the injured worker's disability claim. During the injured worker's lifetime, his or her spouse has no right to file a claim for death benefits. "It is not until death occurs that the right to benefits (death benefits) arises and the potential beneficiaries are identified". *Cortner v. Chevron Intern. Oil Company, Inc.*, 22 B.R.B.S. 218, 220 (1989).

There is a certain symmetry here in the maritime field. The maritime wrongful death claim of dependent survivors is separate and distinct from the decedent's personal injury claim during his lifetime. *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 94 S.Ct. 806, 818, 39 L.Ed.2d 9 (1974), *aff'g*, 463 F.2d 1331, 1332 (5th Cir. 1972).

The Petitioners suggest a "patent asymmetry" in the law because, it is said, "critical aspects of a potential death claim vest at the time of the worker's injury". (Pet. Brief 21-22). The patent asymmetry in this case is the Petitioners' argument that a dependent widow is a "person entitled to compensation" before she has *any* entitlement under the LHWCA – before her husband dies. The Petitioners argue that § 33(g) applied to Mrs. Yates at the time of her husband's injury "since Mrs. Yates' status as a dependent widow was established as of the time of her husband's injury". (Pet. Brief 21) (emphasis added). Logically and factually, how could Mrs. Yates' "status as a dependent widow" be established as of the time of her

husband's injury, obviously, before she became a widow? And what about the other two contingencies noted by the ALJ, the BRB, and the Fifth Circuit – a divorce from her husband or her husband's death from causes unrelated to his employment? The answer is obvious. Not even the most prescient person could predict the outcome of those contingencies at the time of Mr. Yates' injury. If the Petitioners' argument is carried to its logical conclusion, what about § 14 penalties and interest? Does the employer owe a death claimant penalties and interest before her injured spouse dies, or in other words, before the death claimant even has a claim (an "entitlement") that can be asserted for death benefits?

The Petitioners' argument that the "critical aspects of a potential death claim vest at the time of a worker's injury" and that a "widow's claim for compensation benefits is derivative of the initial injury" is a disingenuous attempt to tiptoe around *Cowart* and the language of § 33(g). Obviously, there is a connection between a deceased worker's original injury and a death claim, because the 1984 Amendment to § 9 of the Act provides a death benefit only if the employment injury causes the employee's death. *Shea v. Director, OWCP, supra*, at 737. However, here the focus is whether Mrs. Yates was a "person entitled to compensation" at the time of the pre-death settlements, and therefore, whether her claim for death benefits had vested at the time of the pre-death settlements. Put another way, did Maggie Yates qualify for a death benefit at the time of the pre-death settlements? The ALJ, the BRB, and the Fifth Circuit correctly

answered, no, because Maggie Yates' "right to death benefits under the Act could not have vested *before* she became a widow". (Pet. App. 35) (BRB's emphasis).

c. *Cretan v. Bethlehem Steel Corp.* Fundamentally Ignores The Critical Distinction Between A "Person Entitled To Compensation" And A Person Potentially Entitled To Compensation Drawn In *Cowart* And By § 33(g)(1).

The Petitioners argue that the § 33(g) issue is controlled by *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843 (9th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 2705, 129 L.Ed.2d 833 (1994) and *Force v. Director OWCP*, 938 F.2d 981 (9th Cir. 1991), on which *Cretan* relies. (Pet. Brief 8, 16-20, 25). First, *Force* is a pre-*Cowart* decision. Its premise, and therefore the premise of *Cretan*, is that "a claimant's status as a 'person entitled to compensation' need not be fixed at any particular moment" for purposes of § 33(f) or (g). (Pet. Brief 17); *Force v. Director OWCP*, *supra*, at 984-85; *Cretan v. Bethlehem Steel Corp.*, *supra*, at 846. The Ninth Circuit held in *Cretan* that "entitlement does not have to become vested at the time the settlement is made". Therefore, reasoned the Ninth Circuit, the dependent wife and child of a disabled worker forfeit their rights to LHWCA death benefits by entering into third-party settlements while the injured worker is alive, even before the wife and dependent child could invoke the Act to claim death benefits and even before there was any entitlement to death benefits.

Cretan is hopelessly in conflict with *Cowart*. *Cowart* specifically held that the outcome-determinative issue

was whether the claimant was a "person entitled to compensation" at the time of the third-party settlement.

> "The question is whether Cowart, *at the time of the Transco settlement* was a 'person entitled to compensation' under the terms of § 33(g)(1) of the LHWCA". *Cowart*, 112 S.Ct. at 2594. (emphasis added).

Even *Cretan* recognizes that the definition of "entitlement" in *Cowart* supports a conclusion opposite to the conclusion the Ninth Circuit reached. *Cretan*, *supra* at 847. The Ninth Circuit in *Cretan* considered this Court's language in *Cowart* that the employee "became a person entitled to compensation at the moment his right to recovery vested" as dicta that was not binding on the Ninth Circuit. As observed by the Fifth Circuit, "the precise issue presented in *Cowart* was the definition of 'a person entitled to compensation'. The Court's determination that the employee qualified under this statutory test when his right to recovery vested is the core of the Supreme Court's holding". *Ingalls Shipbuilding, Inc. v. Director OWCP*, *supra* at 464.

Cowart's discussion of the statutory phrase "person entitled to compensation", of which both *Cretan* and Ingalls are so dismissive, is far from "isolated language" or "dicta". The Court's analysis in *Cowart* was central to the discussion of § 33(g)(1) and (2). The Court's analysis of the meaning of "entitled" was necessary only because the statute required that Cowart have been "entitled to compensation" *at the time of the third-party tort settlement*. (emphasis added).

"Explicit rulings on issues that were before the higher court. . . . are not dicta". *Cole Energy Dev. Co. v. Ingersoll Rand Co.*, 8 F.3d 607, 609 (7th Cir. 1993); *Harris v. Sentry Title Co.*, 806 F.2d 1278, 1280 (5th Cir. 1987). "Dictum" describes comments relevant, but not essential, to disposition of legal questions pending before a court. *Doughty v. Underwriters at Lloyd's, London*, 6 F.3d 856, 861 (1st Cir. 1993). The Court's discussion in *Cowart* of the meaning of "person entitled to compensation" can hardly be considered dicta on the construction of § 33(g).

A "potential widow" cannot be expected to be prescient about the possibility of an LHWCA claim for death benefits down the road. As pointed out by the ALJ, "the death must be related to the work injury in order for the widow to have a claim. . . . until her husband's death, claimant could not relate his job-related disability to his death". (R. 251). Moreover, Mrs. Yates "could not have known ahead of time that she would outlive her husband, or that she would still be his wife at the time of his death". Thus, in the event of divorce, death before her husband, or Mr. Yates' death from causes other than his employment-related asbestosis, Mrs. Yates' right to death benefits under the Act would never have accrued.

Cretan's reliance on "policy considerations" is misplaced. This Court in *Cowart* refrained from judicially amending the plain statutory language of § 33(g) and deciding the case on "policy" grounds. The Court recognized that its ruling would work a harsh result on

workers and would, at the same time, arm employers with a powerful defense. The Court stated:

> "We do recognize the stark and troubling possibility that significant numbers of injured workers or their families may be stripped of their LHWCA benefits by this statute, and that its forfeiture penalty creates a trap for the unwary. It also provides a powerful tool to employers who resist liability under the Act. . . . But Congress has spoken with great clarity to the precise question raised by this case. It is the duty of the courts to enforce the judgment of the Legislature, however much we might question its wisdom or fairness". *Cowart, supra*, at 2598.

We note that the Court referred to "families" of workers, which reinforces that the Court's interpretation of the phrase "person entitled to compensation" was not "dicta" or "isolated language" having no relevance to a widow's death claim, as found by the Ninth Circuit in *Cretan*. Indeed, the Court noted that the employer and carrier in *Cowart*, through counsel, funded the very third-party settlement which was used to avoid the employer's liability under the LHWCA. *Id.* The Court and experienced practitioners recognize that the employer and carrier can refuse to pay LHWCA benefits to a claimant, and can at the same time literally serve as the "tail that wags the dog" if the claimant pursues a third-party recovery. Roberts, "The LHWCA Lien – The Tail That Wags The Dog", 1993 *Southeastern Admiralty Law Institute*. But, policy considerations cannot override the plain language of the statute, as the Court has observed. And, when the shoe is on the other foot – where *Cowart's* definition of

"person entitled to compensation" is precise and outcome-determinative in favor of the claimant as here – no "policy considerations" can override the statute.

Cretan dismisses *Cowart* and the plain language of the statute on grounds of a "central policy of employer protection that is evident on the face of sections 33(f) and (g)" and a policy against "double recovery". *Cretan, supra,* at 847. The Ninth Circuit expressed a fear that death claimants could manipulate tort settlements to frustrate these "policy considerations". These arguments, essentially made again in this case to fend off applying *Cowart* to Mrs. Yates' claim, are addressed to the wrong branch of government. If the situation presented here, an LHWCA death claimant making third-party settlements when she is not a "person entitled to compensation", is a "loophole", then Congress can amend the statute. A judicial amendment of the statute is not warranted. *Cowart, supra,* at 2598.

The Petitioners argue that the Fifth Circuit's interpretation of *Cowart* and the term "person entitled to compensation" defeats the employer's right of offset under § 33(f), and that identical terms ("person entitled to compensation") within an act should bear the same meaning. The Respondent agrees that the phrase "person entitled to compensation" should be given the same meaning for purposes of § 33(f) and (g). But the point is, the Court cannot act on "policy considerations", borne out of notions of "equity" or "fairness", in order to "protect employers against double recovery" (Pet. Brief 25), by contradicting the plain language of the statute. *Cretan's* interpretation of *Cowart* based on "policy considerations" is a judicial rewriting of the statute to suit such

perceived notions. The plain language of § 33 of the Act and this Court's decision in *Cowart* do not grant the Ninth Circuit leave to "stride the quarter-deck of. . . . jurisprudence and. . . . dispense. . . . that which equity and good conscience impels" as a Chancellor. *Compania Anonima Venezolana De Navegacion v. A. J. Perez Export Co.,* 303 F.2d 692, 699 (5th Cir. 1962), *cert. denied,* 371 U.S. 942 (1962). *Cretan* dismisses the import of *Cowart,* and also its own precedent in *Todd Shipyards Corp. v. Witthuhn, supra,* which unambiguously states that a survivor's right to death benefits *vests* when the injured worker dies. *Id.,* at 902. (emphasis added).

Congress has not provided a remedy for every possible circumstance under the Act, and in some cases, there is no remedy. The Act provides no remedy for an employer to recover overpayments from a medical care provider. *Petroleum Helicopters, Inc. v. Nancy T. Garrett, L.P.T.,* 23 F.3d 107, 108 (5th Cir. 1994). A court cannot "fill the gap" perceived by the employer by contradicting the plain language of the statute. *Id.,* at 108-09. And what of an overpayment of compensation to the employee when no future compensation is due? The employer has no separate claim against the employee. The employer's only remedy is to offset overpayments against future compensation installments, if any future installments are due. *Id.,* at 109-10; *Lennon v. Waterfront Transport,* 20 F.3d 658, 661 (5th Cir. 1994); *Vincent v. Consolidated Operating Co.,* 17 F.3d 782, 786 (5th Cir. 1994) (fn. 12); *Ceres Gulf v. Cooper,* 957 F.2d 1199, 1205-07 (5th Cir. 1992).

Congress did not provide protection for "potential" employer credits, because the language of the statute only concerns present, vested rights. Section 33 is

designed to protect persons presently entitled to compensation. Section 33(a) permits a "person entitled to compensation" to receive compensation under the Act and also recover damages against a third party, without an election. Section 33(b) provides that "acceptance of compensation under an award in a compensation order" operates as an assignment of the third-party rights of the "person entitled to compensation", if the claimant does not bring an action against the third party within six (6) months after acceptance of compensation. This automatic assignment of the claimant's right to sue a third party reverts back to the "person entitled to compensation" if the employer fails to bring an action against the third party within ninety (90) days after the cause of action is assigned. Section 33(b) specifically defines an award as a "formal order" issued by the Deputy Commissioner, an ALJ, or the BRB.

Section 33(e) spells out the distribution of a third-party recovery when the employer successfully pursues a third party claim pursuant to the automatic assignment. Section 33(f) refers again to the "person entitled to compensation", and provides for a credit to the employer from a third-party recovery "if the 'person entitled to compensation' institutes proceedings *within the period prescribed in § 33(b)*. (emphasis added). In other words, § 33(f) relates back to § 33(b), and therefore refers to *present* rights to LHWCA compensation. (emphasis added). Section 33(g) likewise refers to a "person entitled to compensation", as defined in *Cowart*. Hence, the statute deals only with present rights to compensation. Fairly read, the statute enacted by Congress limits employer

protections to rights that are presently accrued. The Petitioners' plaintive policy arguments concerning § 33(f) offsets, and § 33(g), are addressed to the wrong branch of government. The proper audience is Congress, rather than the Court.

An instructive example is *United Brands Co. v. Melson*, 594 F.2d 1068 (5th Cir. 1979). There, Melson filed a claim for workers' compensation benefits against one employer under the Louisiana Workmen's Compensation Act, and followed it almost fifteen months later with an LHWCA claim under the LHWCA employer. Melson then settled his state compensation claim one month after filing the LHWCA claim. The LHWCA employer argued that it was entitled to credit for the amount recovered by Melson in his state compensation claim. The employer argued that failure to permit it credit for the state compensation award allowed the claimant a "double recovery". *Id.*, at 1074.

The Fifth Circuit assumed that the claimant had obtained a "double recovery", but observed that the LHWCA in 1979 contained only two provisions for a set-off, § 14(k) permitting reimbursement of advance payments of compensation from future compensation installments and § 33. At the time, the LHWCA had no provision allowing an employer credit for recoveries from a state compensation claim. Although the court believed that the claimant had obtained a "double recovery", the Fifth Circuit properly deferred to the legislative branch.

> "Until Congress is moved by this unusual situation, we think that the solution to this difficult problem is to allow the windfall of double recovery to reside with the injured worker

> rather than allow the set-off windfall to accrue to United Brands". *Id.*, at 1075.

And, in 1984, Congress remedied this perceived inequity by permitting an LHWCA employer a credit for benefits paid to the claimant pursuant to another workers' compensation law. 33 U.S.C. § 903(e). *Cretan* is not "controlling" because it ignores the critical distinction drawn by *Cowart* and the statute between a "person entitled to compensation" and a person potentially entitled to compensation. Section 33(g)(1) of the Act plainly makes that distinction. It is the Petitioners that are attempting to "engraft an exception" into § 33 (Pet. Brief 9), not the Respondent.

The Petitioners urge that Mrs. Yates extinguished Ingalls' subrogation rights against the third-party defendants by entering into the pre-death settlements. (Pet. Brief 14). None of the pre-death settlements foreclosed Ingalls from bringing its own claim for reimbursement under *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 89 S.Ct. 1144, 22 L.Ed.2d 371 (1969). (Pet. App. 63). As Ingalls has asserted in other litigation, it has "an independent *Burnside* action against any settling third-party defendant who has not obtained Litton's consent to (such) settlement". *Lowe v. Ingalls Shipbuilding, a Div. of Litton Systems, Inc.*, 723 F.2d 1173, 1181 (5th Cir. 1980).

The BRB observed that the pre-death settlements netted an amount greater than Ingalls' compensation lien of $15,454.15, which arose pursuant to Ingalls' payment of the May, 1983 § 8(i) settlement of Jefferson Yates' *disability* claim. (Pet. App. 48-49) (emphasis added). Since the

amount of the pre-death settlements exceeded the compensation due Mr. Yates, written approval of the pre-death settlements was not required under § 33(g)(1). If the "person entitled to compensation" settles with a third-party for an amount greater than or equal to the employer's total liability, prior written approval of the settlements is not required. *Cowart, supra*, at 2597; *Villanueva v. CNA Ins. Companies*, 868 F.2d 684, 687-88 (5th Cir. 1989); *Peters v. North River Ins. Co.*, 764 F.2d 306, 311 (5th Cir. 1985). The anomaly here is that Jefferson Yates was the "person entitled to compensation" at the time of the pre-death settlements, not Mrs. Yates, and no written prior approval of these settlements was required of Mr. Yates as well.

At the time of the pre-death settlements, Maggie Yates did not meet the prerequisites for entitlement to death benefits. Her claim for death benefits did not vest or accrue until Jefferson Yates' death. Therefore, she was not a "person entitled to compensation" within the meaning of § 33(g)(1). And, there was no forfeiture under § 33(g)(1) and (2).

2. DOES THE DIRECTOR OF THE OFFICE OF WORKERS' COMPENSATION PROGRAMS HAVE STANDING TO RESPOND TO A PETITION FOR REVIEW OF A BENEFITS REVIEW BOARD DECISION PURSUANT TO FED.R.APP.P. 15(a).

There is a distinction between petitioning for a review of a BRB order pursuant to 33 U.S.C. § 921(c), and the authority to appear as a respondent pursuant to Fed.R.App.P. 15(a), an issue reserved by the Court in

Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., ___ U.S. ___, 115 S.Ct. 1278, 1284, 131 L.Ed.2d 160 (1995). The Director has routinely appeared as an intervenor because of the Director's administration and enforcement of the Act. The Court shows deference to the Director's interpretation of the Act. *I.T.O. Corp. v. Pettus*, 73 F.3d 523, 526 (4th Cir. 1996) (fn. 1).

The Petitioners argue that the Director's only reason for appearing as a Respondent is that "he does not agree with Ingalls". (Pet. Brief 33). Fed.R.App.P. 15(a) requires the petitioner seeking a review in an administrative agency's order to name the agency as a respondent. In light of Fed.R.App.P. 15(a) and because the Director's views are more than just of passing interest, it would be an anomaly to preclude the Director from expressing those views in court as a respondent on issues of national import.

The Secretary of Labor has the authority to appoint counsel to represent him or her "in any court proceedings under § 921". 33 U.S.C. § 921(a). Pursuant to that authority, the Secretary has named the Director of OWCP as his designee responsible for enforcing the LHWCA, and as the proper party to appear on behalf of the Secretary in all review proceedings. As a respondent, the Director is not required to stand mute, nor should he be expected to. The Fifth Circuit correctly followed precedent holding that the Director is a proper respondent under Fed.R.App.P. 15(a), which expressly requires a party seeking review of an agency order to name the agency as a respondent. *Ingalls Shipbuilding Div. v. White*, 681 F.2d 275, 281-84 (5th Cir. 1982), *overruled on other grounds, Newpark*

Shipbuilding & Repair, Inc. v. Roundtree, 723 F.2d 399 (5th Cir.) (*en banc*), *cert. denied*, 469 U.S. 818 (1984).

CONCLUSION

The Fifth Circuit correctly decided that Mrs. Yates' right to death benefits was not barred by § 33(g), because Mrs. Yates was not a "person entitled to compensation" at the time of the pre-death settlements. At the time of the pre-death settlements, it was Mr. Yates, not Mrs. Yates, who was the "person entitled to compensation". Mrs. Yates' claim for death benefits did not vest or accrue until Mr. Yates' death. Ingalls participated in a settlement of Mr. Yates' § 8 LHWCA claim during his lifetime. Ingalls recouped its LHWCA payments in full. Ironically, Ingalls now attempts to compel a forfeiture of Mrs. Yates' LHWCA rights because of third party settlements made when Mrs. Yates was not a "person entitled to compensation", and from which Ingalls benefited. No arguments based on "policy considerations" or "fairness" can justify a judicial amendment of the statute when it is clear by its terms. The holding of the Ninth Circuit in *Cretan* is clearly and hopelessly in conflict with this Court's holding in *Cowart*. Accordingly, the ruling of the Fifth Circuit should be affirmed.

The Fifth Circuit's ruling should also be affirmed on the standing of the Director as a respondent on appeal. The interest of the Director in such issues of national import is substantial, and the Director's views are entitled to deference. The notion that the Director's views are

entitled to deference would be meaningless if the Director is not permitted to present them in Court.

Respectfully submitted,

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